
Comparison of Guarantee Law Based on Islamic Law and Positive Civil Law in Indonesia

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ABSTRACT

Introduction: Guarantee law is the entire legal rule that regulates the legal relationship between the giver and the recipient of the guarantee in relation to the imposition of the guarantee to obtain a facility or credit. In general, guarantees in Islamic law (fiqh) are divided into two, namely guarantees in the form of people (personal guarantees known as dlamam or kafalah) and guarantees in the form of property (rahn). Formulation of the problem: How is the legal guarantee based on Islamic law and civil law combined in positive law in Indonesia. Methods: This study uses a juridical normative method. Research Results and Discussion: The existence of guarantees is recognized in Islamic law. For guarantees provided by other parties for obligations/achievements that must be carried out by the guarantor (debtor) to the party entitled to fulfill the obligations/achievements, it is called kafalah. Then, collateral related to objects/assets that must be given to debtors (debtors) to creditors (debtors) is called rahn. Conclusion: In the Indonesian legal system, a guarantee is categorized into a guarantee that arises because it is determined by regulations and agreements, namely general guarantees and special guarantees, material guarantees and individual rights, guarantees for movable objects (onroerende goederen) and immovable objects (onroerende). zaken), guarantee by controlling and not controlling the object. collateral related to objects/assets that must be given to debtors (debtors) to creditors (debtors) is called rahn. Conclusion: In the Indonesian legal system, a guarantee is categorized into a guarantee that arises because it is determined by regulations and agreements, namely general guarantees and special guarantees, material guarantees and individual rights, guarantees for movable objects (onroerende goederen) and immovable objects (onroerende). zaken), guarantee by controlling and not controlling the object. collateral related to objects/assets that must be given to debtors (debtors) to creditors (debtors) is called rahn. Conclusion: In the Indonesian legal system, a guarantee is categorized into a guarantee that arises because it is determined by regulations and agreements, namely general guarantees and special guarantees, material guarantees and individual rights, guarantees for movable objects (onroerende goederen) and immovable objects (onroerende). zaken), guarantee by controlling and not controlling the object.

Keywords: Comparison; Guarantee; Islamic law; Civil law.

PRELIMINARY

In everyday life, individuals and legal entities need money to finance their businesses. However,

sometimes their money is not enough. So, sometimes they are forced to borrow money from other people or legal entities who have sufficient funds.

The term "guarantee" comes from the word "guarantee" which means responsibility and responsibility. Collateral is something that is given to creditors to increase their confidence that the debtor will fulfill obligations that can be valued from the money arising from an engagement.

Security Law is a group of legal regulations that regulate the legal relationship between the giver and the recipient of the guarantee related to the imposition of collateral to obtain facilities or credit. (1)

In lending and borrowing activities that arise in the community, it is known that in general, debtors are often required to deposit debt guarantees to creditors. Debt guarantees can be in the form of goods (objects), namely material guarantees and/or in the form of a promise to pay off debts or so-called individual guarantees. Material guarantees provide material rights to guarantee holders.

Security law is a group of regulations that regulate or discuss borrowing and borrowing in the context of debt (debt of money). This law is available in various applicable laws and regulations. (2)

The term "legal guarantee" is a translation of *zekerheidstelling* or *zekerheidsrechten*. The term legal guarantee includes both material guarantees and personal guarantees. Material guarantees include special debts, agreements, and mortgages; while personal guarantees include debt coverage (*borgtocht*) (3). With regard to understanding, experts develop a general understanding of the law of guarantees. The elements contained in the preparation of the guarantee law are (4):

1. A set of legal regulations that can be based on written (original and derivative) or unwritten legal regulations.
2. Guarantee law regulations regulate the legal relationship between the guarantor (debtor) and the guarantee recipient (creditor).
3. There is a guarantee deposited by the debtor to the creditor.
4. The guarantee provided by the guarantor is intended as collateral.

The function of the guarantee is as a means of protecting the security or certainty that the debtor's debt will be repaid to the creditor. The juridical guarantee has the function of covering the debt.

Therefore, the guarantee is in addition to other factors (nature, ability, capital, collateral, and economic situation), which can be used as a means of protection for the lender against the certainty that the debtor will repay the debt (5).

Collateral serves to convince the bank or creditor that the recipient of the debt has the ability to repay the debt given to him, in accordance with the agreement. Financial guarantees in the form of nature, ability, capital, and business prospects of debtors are immaterial guarantees that serve as the first solution. With this immaterial guarantee, it can be estimated that the debtor is able to manage his company well, so that he is able to obtain business profits to pay off debts as promised. Financial guarantees in the form of collateral (material) serve as a second way out. As a second solution, the execution of the sale/collateral execution can only be carried out if the borrower fails to fulfill obligations through the first exit (6). The basic assessment of the guarantee is based on the following points:

- a. Market value

Is an estimate of the amount of money that can be obtained from a sale and purchase transaction or an exchange of ownership on the date of valuation between a buyer who is interested in buying and a seller who is interested in selling in a bond-free transaction whose offer is carried out sincerely, carefully, and without coercion.

b. New value (reproduction)

Is an estimate of the amount of money spent in carrying out the construction/replacement of a new property which includes costs, labor wages, and other related costs.

c. Fair value (reimbursement of depreciation expense)

Is an estimate of the amount of money obtained from the calculation of the cost of new reproduction minus the depreciation value.

d. The value of coverage

Is an estimate of the amount of money obtained from the calculation of the cost of replacing the new part of the property that needs to be insured minus depreciation.

e. Liquidation value

Is an estimate of money obtained from buying and selling goods in the market in a limited time where the seller is forced to sell.

f. Book value

Is the value of the asset written on the books less accumulated depreciation or the return on the value of the asset.

The position of collateral in financing has special characteristics. Not all goods or property can be used for collateral in financing, because it must meet the elements, MASTS (7), namely:

- a. *Marketability*, namely the existence of a market.
- b. *Ascertainably of value*, namely the existence of a certain price standard.
- c. *Stability of value*, i.e. the price of collateral is stable.
- d. *transferability*, guarantees are easily transferable.
- e. *Secured*, the collateralized goods can be held in a formal juridical bond, in accordance with applicable laws and regulations in cases of default.

FORMULATION OF THE PROBLEM

What is the comparison of the law of guarantees in Islamic law and civil law in positive law in Indonesia?

RESULTS AND DISCUSSION

1. The Law of Guarantee in Islamic Law

Credit agreements or contracts require collateral. In general, Islamic banks in Indonesia provide murabaha financing and other financial contracts to determine the terms and procedures that must be met by the buyer, which are almost the same as the credit terms and procedures prescribed by conventional banks.

The general terms and conditions for murabaha financing are: general, not only for Muslims; must obey the law; must comply with civil law; must meet 5C, namely Character (nature); Collateral (guarantee); Capital (capital); Condition of Economy (business prospects); and Capability (ability). Islamic banks apply rahn and rahn tafijily as an assessor of agreement guarantees for murabahah agreements. For example, in housing loans (KPR), Islamic banks will make home loans as collateral for bank customers with a rahn tafijily agreement.

Collateral, or what is also known as collateral, is property belonging to the debtor or a third party that is bound as a means of payment in the case of default of a third party.

"And if you are on a journey while you do not find a writer, then let there be collateral to be held. However, if some of you believe in others, let the one who is trusted fulfill his mandate (debt) and let him fear Allah, his Lord." (Surat al-Baqarah: 283) (8).

Collateral in its broadest sense includes not only assets, but also the ability for debtors to manage the business. For such a guarantee, it is necessary to have analytical skills by financial officers to analyze the money flow of the debtor's business. This is to increase confidence in the ability of the debtor to return the money given based on sharia principles (9).

Generally, guarantees in Islamic law (fiqh) are divided into two, namely: personal guarantees (dlaman or kafalah) and guarantees in the form of property (rahn).

a. *caravan*

Etymologically, kafalah means al-dhamanah, hamalah, and zaamah. All three mean guarantee or bear. Then, based on terminology, kafalah means "a guarantee given by a kafiil (guarantor) to a third party for obligations/achievements that must be fulfilled by a second party (guaranteed)."

In Islamic law, a kafalah contract is considered valid if it fulfills the following terms and conditions:

1. *Kafiil* (person who guarantees);
2. Meaningful (person who guarantees/entitles to guarantee);
3. *Makful 'anhu* (guaranteed/guaranteed persons);
4. *Madmun bih* or better (guaranteed debt/liabilities);
5. *Lafadz iqab qabul*(agreement)

caravanis a guarantee given by a guarantor (kafiil) to a second or borne party (makful'anhu). According to Bank Indonesia, kafalah is a contract in providing guarantees (makful 'alaihi) given to other parties, in which the guarantor is responsible for payment of debt which is the right of the guarantee recipient (makful). Kafalah is divided into two, namely kafalah soul (kafalah bi al-nafs) and kafalah property (kafalah bi al-maal). Kafalah soul is also known as Kafalah bi al-Wajhi, namely the willingness of the guarantor (al-Kafil, al-Dhamin or al-Za'im) to propose a responsible person to whom he promises dependents (Makfullah).

caravansecond is kafalah property, which is an obligation that must be fulfilled by dhamin or kafil with payment (fulfillment) in the form of goods. There are three types of caravan of objects, namely, first, kafalah bi al-Dayn, which is an obligation to pay debts borne by others. Second, kafalah by handing over goods, namely the obligation to deposit certain objects in the hands of others, such as returning the goods of people who are ghasab (borrowed without permission) and handing over the purchased goods to the buyer. Third, forgive faults, which means a guarantee that if the goods

purchased are found to contain deficiencies, because the time is too long or for other reasons, the guarantor (carrier) is willing to guarantee the buyer to fulfill the buyer's interests (i.e. replace the damaged goods).

b. Rahn.

Etymologically, the word al-rahn means permanent, eternal, and guaranteed. The contract of al-rahn in positive legal terms means a guarantee/guaranteed goods. Based on the term, al-rahn is an item used by the owner as a bond collateral for debt (10).

According to Islamic teachings, in making goods that have value as collateral, so that the person can take receivables or take part of the benefits of the goods. According to the Indonesian Ulema Council, Rahn is holding goods as collateral for debts. According to Bank Indonesia, Rahn is a contract to deliver goods/assets from consumers to the bank as collateral for part or all of the debt. Based on the definition derived from the Maliki school, the object of collateral can be in the form of goods or benefits, both of which are assets, according to the majority of scholars. Objects used as collateral (collateral) do not have to be handed over in a real way, but can also be handed over legally. According to scholars from the Shafi'i and Hambali schools, ar-rahn is to make material (goods) as collateral for debt, which can be used as debt payers if the debtor cannot pay the debt. Goods that can be used as collateral are only material, and do not include benefits as stated by the Maliki school of thought. Collateral can be sold if the debt is not paid at the time agreed by both parties. Rahn is considered valid according to Islamic law, if he fulfills the following pillars and conditions:

- a. Ability to act according to the law.
- b. *Shigat* (delivery).
- c. *Al-marhum bihi* (debt).
- d. *Al-marhun* (goods used as collateral).

In addition to the above conditions, fiqh scholars agree that ar-rahn is only considered perfect if the goods stored according to law are in the hands of the creditor and the required money has been received by the borrower. If the collateral is in the form of immovable assets such as houses and land, it is sufficient for the lender to bring a certificate of land ownership or similar documents. The final condition (in the perfection of ar-rahn is called by scholars as qabdh al-marhun (guaranteed goods are regulated by law). This condition is important, because Allah mentions in Surat al-Baqarah (2): 283 "fa rihanun magbudhah" (guaranteed goods are regulated by law). [legally]).

If the collateral has been arranged by the debtor, then the contract is binding on both parties. So, debt is related to collateral. If the debt cannot be paid, then the collateral can be sold and the debt paid off. If there is an excess in the sale of collateral, it must be returned to the owner.

From the explanation of the two concepts above, the existence of guarantees is recognized in Islamic law. For guarantees provided by other parties for obligations/achievements that must be made by the debtor to the party entitled to the fulfillment of obligations/achievements (creditors) it is referred to as kafalah. Collateral related to objects/assets that must be given to debtors (people who have debts) to creditors (debtors) is called rahn.

The concept of a bond of guarantee in Islamic law (fiqh) is found in the discussion of rahn, which is a material guarantee in Islamic law as mentioned above. Interesting things that need to be re-emphasized regarding the issue of rahn related to the bond of guarantee are as follows: First, the rahn contract is additional or continued. Second, control over the object of rahn (al-qabdh, ownership) is not in the form of physical possession, but in the form of proof of ownership. From several legal consequences that emerged after the completion of the rahn contract, it was found that there are similarities between the concept of a bonded guarantee through a guarantee institution in the Indonesian legal system and the concept of rahn. So, for Islamic financial institutions such as Islamic microfinance institutions such as BMT, which implement a guarantee bond system in providing credit or funding for their customers, of course, they can apply the existing guarantee system.

2. Guarantee Law based on Civil Law

Generally, the types of guarantee institutions known in the Indonesian legal system are divided into (11):

a. General and Special Guarantees

General guarantees are guarantees that arise from the application of law and are mandatory rules. Every movable asset or immovable asset belonging to the debtor is not free from the creditor. The legal basis is Article 1131 of the Civil Code. If the debtor is in default, then through a general obligation, the creditor can ask the court to confiscate and auction all of the debtor's assets, unless the goods have other special rights.

b. Additional Guarantees and Main Guarantees

Credit is given to the debtor based on the creditor's "trust" in the debtor's ability to repay the debt in the future. In law, a rule applies that trust is considered the primary guarantee of future debt repayment. Contract guarantees in the form of collateral are only considered as additional guarantees from the main guarantee.

c. Material Guarantee and Personal Guarantee

Material guarantees are guarantees that have a special relationship with certain objects. Material guarantees can also be interpreted as collateral whose objects are in the form of movable assets or immovable assets which are specifically intended to guarantee debtors' debts to creditors if the debt cannot be paid in the future. Material guarantees have a "material" nature, which means that they give the right to take over certain objects and have innate properties that follow the object in question (12).

The current material guarantor can be (13):

- 1) Mortgage rights are material rights to immovable assets that are used as collateral in the terms of an engagement.
- 2) Guarantee rights; objects on land rights and objects related to land with a legal basis, namely the Mortgage Law.
- 3) Pawn is the right obtained by the debtor on movable assets which is handed over to him by a

person who owes it or by another person on his behalf, and authorizes the debtor to take repayment of the object which takes precedence over other debtors.

- 4) Land Pawn; objects on land with a legal basis, namely customary law and Basic Agrarian Law.
- 5) Fiduciary; object of movable or immovable assets with fiduciary law as the legal basis.

Personal guarantees are guarantees that only have a direct relationship with the insurer, not on a particular object. Personal guarantees can be divided into three, namely;

- 1) Personal guarantee (individual guarantee); which a person is subject to the guarantee.
- 2) Company guarantee; which the company is the subject of the guarantee.
- 3) Bank guarantee; namely the guarantee provided by the bank.

Sri Sofwan interprets immaterial (personal) guarantees as "Guarantees that increase direct relationships to certain individuals, can only be made from debtors against other debtors, regarding the debtor's assets in general."

The elements of personal guarantees include:

1. Having a direct relationship with a certain person.
2. Can only be done to certain debtors.
3. Only applies to debtor assets in general.

Personal guarantee (*persoonlijke zekerheid*) is an agreement between the debtor, creditor, and a third person, which guarantees the fulfillment of the debtor's obligations. Article 1820 of the Civil Code states that "Guarantee is an agreement in which a third party, in the interest of the debtor, binds himself to fulfill his obligations to the debt if the person fails to fulfill it." Article 1831 of the Civil Code states that "Guarantors are not required to pay the debtor other than if the debt is neglected, while the debtor's goods must be confiscated and sold to pay the debt." (14)

d. Regulatory and Non-Regulative Guarantees

Regulatory guarantees are credit guarantees that have been explicitly determined by the institution and have received recognition from applicable regulations, such as:

1. KPR, as regulated in the Civil Code and the Agrarian Law.
2. *Creditverband*, set in S. 1908-542 juncto S. 1937-190. Then, its existence is recognized intermittently by the Agrarian Basic Law No. 5 of 1960. Then, with the issuance of the Mortgage Law no. 4 of 1996, this institution was deemed invalid and replaced by land rights.
3. Pawning is regulated in the Civil Code and customary law.
4. Mortgage on Land, regulated in the Basic Agrarian Law and Mortgage Law no. 4 of 1996.
5. Guarantee, regulated in the third book of the Civil Code.

Non-regulatory guarantees are forms of collateral that are not specifically regulated in various regulations, such as transfer of trade bills, transfer of insurance bills, etc.

e. Conventional and Non-Conventional Guarantees

Credit guarantees are considered conventional if the legal institution for guarantees has long been recognized in the Indonesian legal system such as pawns, guarantees, mortgages, mortgages, land pledges, bank guarantees, personal guarantees, etc.

Non-conventional guarantees are types of guarantees that, despite being widely implemented, are still relatively new to the legal system of guarantees – including transfer of claim rights, transfer of

insurance claims, power to sell, guarantees to cover costs.

f. Special executive guarantees and special non-executory guarantees

Special executorial guarantees occur when the law provides special ways for creditors to execute guarantees in case of bad credit, such as mortgages, mortgages, liens, etc.

A special non-executory guarantee is a credit guarantee that does not have a special method of execution. Personal guarantees and company guarantees are included in this guarantee.

g. Goods Handover Guarantee, File Handover Guarantee, and Constructive Ownership Guarantee

Goods handover guarantee is a credit guarantee in which the collateral is physically handed over by the debtor to the creditor's control, while the ownership of the object remains in the hands of the debtor. For example, land pawning in the version of customary law. Document submission guarantee is a credit guarantee that is not physically handed over to the creditor's control, but is still controlled by the debtor. An example is a mortgage.

Constructive ownership guarantees are collateral ownership submitted by the debtor to the creditor, but only constructively, while the power and right to enjoy the results of the collateral object remain with the debtor.

CLOSING

The existence of guarantees is recognized in Islamic law. For guarantees provided by other parties for obligations/achievements that must be made by the debtor against the party entitled to obtain fulfillment of obligations/achievements (creditors) it is referred to as kafalah. Collateral related to objects/assets that must be given by the debtor (debtor) to the creditor (debtor) is called rahn. In the Indonesian legal system, a guarantee is categorized into a guarantee that arises because it is determined by regulations and agreements, namely general guarantees and special guarantees, material guarantees and individual rights, guarantees for movable objects (onroerende goederen) and immovable objects (onroerende zaken), guarantee by controlling and not controlling the object.

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